Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court

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This article argues that Indonesia’s Constitutional Court has played a significant role in that country’s transformation from a violence-prone polity into Southeast Asia’s most stable democracy. The Court has advanced institutional conflict resolution mechanisms and expanded democratic rights—two achievements identified by Linz and Stepan as major indicators of a consolidating democracy. Building on models developed by Ginsburg and Horowitz, my analysis also illustrates why the Court has been able to defend its autonomy and become an agent of democratization. While sharing Ginsburg’s emphasis on high levels of power diffusion as a key reason for the Court’s success, this article moves beyond such an approach. Most importantly, it suggests that the judges’ “judicial activism”—as expressed in a number of controversial but popular decision—increased Indonesian society’s support for the Court to such an extent that it has now become largely invulnerable to attempts of external intervention.

Keywords: Indonesia, democratic consolidation, conflict resolution, constitutional court

For much of the past decade, comparative scholars of democratization observed with some astonishment how post-Suharto Indonesia moved from a fragile and conflict-ridden transition into an early, but much more stable, phase of democratic consolidation. Disproving some gloomy predictions made for Indonesia at the time of Suharto’s fall, the country has established a functioning electoral democracy, stabilized its economy, ended a series of communal conflicts,
and even settled the decades-old separatist conflict in Aceh through political negotiations. This development has been all the more surprising since it took place against the backdrop of a global democratic recession (Diamond 2010), with the Southeast Asian region experiencing reversals of democracy in the Philippines and Thailand. As of 2010, Indonesia is the only country in the Association of Southeast Asian Nations (ASEAN) considered an electoral democracy and the only state in the region classified as “free” (Freedom House 2010).

Both long-time Indonesia watchers and theorists of democracy have struggled to understand the reasons for the democratic progress of a country whose only experience with democracy prior to 1998 had been a short period of parliamentarism in the 1950s. In trying to explain Indonesia’s success, authors have offered a wide variety of possible factors, ranging from the deescalation of religious and ethnic differences (Aspinall 2010), sound economic management (Hill and Manning 2009), and the modernization of the electoral landscape (Mujani and Liddle 2010), to the gradual marginalization of the military (Mietzner 2009). While all of these analyses are important contributions to the debate, one significant part of the puzzle has often been overlooked: the role of Indonesia’s Constitutional Court. This omission occurred despite obvious indications that the Court at least assisted in Indonesia’s political stabilization, particularly in the areas of conflict resolution and the expansion of democratic rights. Most important, since the establishment of the Court as a judicial and political arbitrator in 2003, there has been no more large-scale violent conflict between Indonesia’s major sociopolitical forces, and the country’s score in political rights and civil liberties increased significantly in all relevant democracy indexes (Freedom House 2010).

That constitutional courts can play a positive role in the stabilization of transitional democracies is not a new theoretical insight, and it is certainly not limited to Indonesia. According to Donald L. Horowitz (2006, 128), constitutional courts have the potential to support “the transition to and consolidation of a stable democratic regime.” However, not all constitutional courts have advanced democracy. In 2005, more than 75 percent of all states had mechanisms for judicial review (i.e., a process for evaluating the constitutionality of legislation), exercised either through ordinary courts or separate constitutional courts. Among these states, there were “a good many countries with undemocratic regimes” (Horowitz 2006, 125), suggesting that there is no stringent causal link between the creation of a constitutional court and successful democratization.
Accordingly, in recent years the scholarship on constitutional courts has focused on the factors that led some courts to become agents of democratization, while others failed or turned into instruments of autocratic regimes. Tom Ginsburg (2003), for example, has emphasized that a court’s ability to defend democratic rights in the face of vested political interests is to a large extent determined by its institutional design (for instance, the level of general access to the court and the appointment mechanism for the judges). Others, like Ruti Teitel (2007), have explained the divergent performance of courts by the different law traditions they use, and still others—such as Ran Hirschl (2004)—have identified elite attitudes as the most crucial determinant.

This article analyzes the ways in which Indonesia’s Constitutional Court has contributed to political conflict resolution and democratic consolidation. It argues that the institutional factors highlighted by Ginsburg are partly responsible for the Court’s success, and it also shares Ginsburg’s view that the diffusion of political power in particular societies can increase the likelihood of elite support for constitutional courts and their rulings. But in one important aspect, the article goes beyond Ginsburg and the mainstream literature on constitutional courts and it challenges some accounts of the Indonesian Court so far. Horowitz (2006, 132), for example, has warned that “involvement in major political controversies” can severely damage the court’s credibility and integrity. In Horowitz’s opinion (2006, 131), courts should not try to “intrude into politics,” with the Hungarian Court providing a classic example for harmful politicization (Scheppel 1999). In the same vein, Simon Butt (2006) has criticized the Indonesian Court for its “activism,” suggesting that it frequently oversteps the boundaries of its mandate in order to pursue its own agenda. In this article, however, I argue that it is precisely the corrective (and very aggressive) intervention in highly contentious political issues that has consolidated the moral stature of the Court in Indonesian society. These interventions have bolstered the Court’s popularity, which in turn has offered its judges additional protection from elite attempts to influence their decisions.

I develop my arguments in six analytical steps. The discussion begins with an overview of the turbulent early phase of Indonesia’s transition, in which an unclear institutional framework triggered political conflict and eventually led to the creation of a constitutional court in 2003. Second, the article illustrates the institutional design of the Court, confirming Ginsburg’s stress on judicial powers but also underlining the significance of administrative autonomy. The third section of the discussion examines in detail selected verdicts in the field of political (and,
in particular, electoral) conflict resolution, demonstrating how the Court mitigated intra-elite tensions. Fourth, the article highlights the Court’s contribution to the expansion of democratic rights, looking at important rulings that advanced civil liberties and granted Indonesian voters a greater say in elections. The fifth section offers explanations for the ability of the Court to withstand external pressure and impose its verdicts against disgruntlement within the elite. With Ginsburg, the discussion points to the importance of political “diffusion” in establishing the judges’ power, but it also introduces additional explanatory propositions: the support and “coercion” exercised by civil society, the personal courage of judges, and the increasing popularity of the Court as the result of high-profile interventions in political affairs. Finally, the article concludes by crediting the Court for its role in Indonesia’s democratic consolidation but also warn that the Court’s success has papered over the crisis of the country’s other political and judicial institutions.

Political Conflicts Before 2003:
Mass Mobilization and Military Intervention

Most scholars agree that the introduction of constitutional courts (or other mechanisms of judicial review) generally occurs during political transitions or periods of major political and economic change (Ginsburg 2003; Hirschl 2004; Horowitz 2006; Hilbink 2006). In Ginsburg’s view—which is shared by Horowitz—heightened political uncertainty tends to convince worried political elites that an independent court overseeing the constitutionality of laws and policies could offer them “protection against a day when their adversaries may act against them” (Horowitz 2006, 126). This model of constitutional courts as an “insurance policy” against political upheaval and authoritarian majority rule is also applicable to the case of Indonesia, where the idea of creating a constitutional court was born out of a period marked by regulatory chaos, political violence, and the threat of a major constitutional breakdown.

This period of prolonged uncertainty in Indonesia began with the fall of Suharto in 1998, which threw the country into a turbulent postauthoritarian transition (Manning and van Diemen 2000; Budiman, Hatley, and Kingsbury 1999; Schulte Nordholt and Asnan 2003; Bresnan 2005). During that transition, Indonesia experimented with various new models of governance. The rules of the old regime were no longer in place, but new norms were difficult to establish in a polity undergo-
ing rapid and uncontrolled change. In this climate of institutional disorder, political actors had very few reference points when trying to settle disputes among themselves or with state institutions. Under the New Order, Suharto or his assistants in the bureaucracy and the military had been the ultimate arbitrators in intra-elite conflict (Budiman 1990). After 1998, however, such an unchallengeable authority no longer existed, encouraging conflicting parties to seek superiority by showing off their organizational muscle. Political parties set up so-called task forces (a euphemism for militias); religious organizations mobilized their internal security groups; and even the police and the military sought the help of paid mobs to intervene in political conflicts. None of the key actors seriously entertained the idea of turning to the Supreme Court, Indonesia’s highest judicial institution at that time, to resolve disagreements. Eroded by decades of authoritarian manipulation, corruption, and mismanagement (Pompe 2005), the Supreme Court lacked not only jurisdiction but also credibility. The use of force and intimidation, it appeared, was the most effective way for politicians to gain the upper hand in conflicts over the posttransition political order.

The absence of legal mechanisms for political conflict resolution in the early post-Suharto period was epitomized in three major incidents that destabilized Indonesian politics at that time: the 1998 special session of the People’s Consultative Assembly (Majelis Permusyawaratan Rakyat, MPR), electoral disputes in 1999, and the impeachment of President Abdurrahman Wahid in 2001. In all three cases, key sociopolitical forces quarreled over unclear laws and regulations, triggering conflicts that threatened to derail the democratization process. To begin with, President B. J. Habibie convened a special session of the MPR in November 1998, hoping that the country’s highest-ranking legislative body would legitimize his ascendancy to power and approve his reform plans. The student movement, however, demanded Habibie’s resignation, and it consequently organized protests to prevent the MPR from convening. In response, Habibie asked the military and police to arrange counterdemonstrations and secure the MPR session by force (Crouch 1999, 132). Security officials recruited thugs affiliated with Islamic militias to face off with the students, trying to raise the impression that the conflict was one between societal groups rather than between reformist students and the state. The standoff led to chaos in Jakarta, and when the students tried to march toward the MPR compound, security forces opened fire, killing at least seventeen people.

The November 1998 tragedy was a direct result of the legal uncertainty surrounding the evolution of post–New Order Indonesia. With no
credible judicial referee in place, all parties involved resorted to violence in order to prevail. In the eyes of the students, the Supreme Court had discredited itself as a potential arbitrator by swearing in Habibie after Suharto’s resignation. Only days before the killings, students had demonstrated in front of the Supreme Court, demanding that the judges withdraw Habibie’s mandate, but the protesters had been beaten up by security forces. With the reputation of the Supreme Court in tatters, conflict “resolution” occurred through mob mobilization rather than through legal deliberations.

This trend—which was accompanied by a drastic increase of vigilantism in Indonesian villages (Tadjoeeddin and Murshed 2007; Welsh 2008)—also continued in the highly contested and legally drawn-out elections of 1999. The 1999 electoral laws included no institutional mechanism for resolving disputes, only vaguely requiring polling booth officials to consider protests from candidates or society and “immediately” make “corrections.” The announcement of the overall election results, however, was left to the General Elections Commission (Komisi Pemilihan Umum, KPU). The KPU, which at that time consisted of representatives of all forty-eight parties participating in the ballot, had to reach consensus on the validity of the count, giving parties (including those who failed to win seats) an effective veto right. Not surprisingly, twenty-seven parties refused to sign off on the results. Eventually, Habibie declared the vote valid, but some parties continued to view the 1999 elections as illegitimate and even asked the Inter-Parliamentary Union (IPU) to withhold their recognition.

The disputed legitimacy of the 1999 elections also played a role in the most ferocious political conflict of the early postauthoritarian period: the impeachment of President Abdurrahman Wahid in 2001. In his incessant fight with parliament, Wahid claimed in early 2001 that the 1999 polls were invalid and that the legislature should be disbanded. For its part, parliament began impeachment proceedings against Wahid, a process not clearly defined in the existing constitution. While the chief justice of the Supreme Court endorsed the impeachment by attending the MPR session that dismissed Wahid, the real key to the outcome of the conflict was held by the military. As supporters and opponents of Wahid began to mobilize, and violent clashes occurred particularly in Wahid’s home province of East Java (Feillard 2002), the armed forces emerged as the only entity that could bring resolution to the conflict. Enjoying renewed attention after years of political marginalization, the military was lobbied by both Wahid and his adversaries for support (Mietzner 2006). With Wahid threatening to order his
loyalists to occupy parliament and have the military leadership arrested if it did not back him,\textsuperscript{4} the armed forces ultimately turned against the president and approved of his removal in July 2001. Wahid's hastily issued decree that disbanded parliament and the MPR was ignored, and Wahid's vice-president, Megawati Sukarnoputri, was sworn in as his successor. This time, the absence of a credible judicial arbitrator not only had led to grassroots violence and brought Indonesia close to constitutional breakdown, but it had also facilitated the military's return into the political limelight.

But as Ginsburg and Horowitz have demonstrated in the cases of other transitional states, periods of extreme political instability and uncertainty not only undermine the prospects for democratic consolidation; they can, in fact, also provide the main motivation for contending elites to converge on institutions for political and legal conflict resolution. Indonesia has been a compelling example of this. In November 2001—five months after the controversy over Wahid's presidency had ended—the MPR unanimously approved an amendment to the constitution that mandated the establishment of a constitutional court. Indonesia's politicians deliberately opted for the creation of a new court instead of handing the power of judicial review to the Supreme Court, probably believing that a "fresh start" was preferable to empowering "sitting judges \ldots frequently accused of corruption and incompetence" (Horowitz 2006, 126).\textsuperscript{5} In 2002, therefore, the MPR completed the constitutional amendments (the most important of which was the introduction of direct presidential elections) and stipulated that the Constitutional Court had to be created by August 2003 at the latest (King 2004). With these collectively endorsed innovations, Indonesia created the foundations for its eventual move from a turbulent postauthoritarian transition into the phase of democratic consolidation (Crouch 2010).

\textbf{The Creation of the Court: Powers and Responsibilities}

While the establishment of the Constitutional Court was a direct response to the obvious lack of a judicial referee in Indonesian politics, it was also driven by an "intrinsic desire among state elites to join the world's community of democracies" (Davidson 2009, 298). South Africa, South Korea, and Thailand had launched their respective constitutional courts in the 1980s and 1990s, as had all countries in postcommunist Eastern Europe. Some of these examples informed—in a rather
eclectic way—the drafting of Indonesia’s Law 24 of 2003 on the Constitutional Court. Through that statute, which reflected the constitutional amendments of 2001, the Court was given five main mandates: to conduct judicial reviews; to settle conflicts between key state institutions; to dissolve political parties found in violation of certain regulations; to resolve electoral disputes; and to verify whether the president and/or vice-president truly acted in contravention of the constitution if so accused by parliament. While Horowitz (2006, 131) remarked that some of these powers were “extraneous to constitutional adjudication” and thus “might better be left to independent commissions,” in one important aspect the Court’s authority was limited: unlike the Italian Constitutional Court, which has the right to change the language of laws, the Indonesian Court was only allowed to act as a “negative legislator”—that is, it can annul legislation but not create its own. This restriction aimed to prevent the politicization of the Court and to maintain the balance between executive, legislative, and judicial institutions. However, as we shall see, the Court soon began to test the boundaries of its mandate.

In order to secure the independence of the Court and insulate it from the rampant corruption that cripples most of Indonesia’s other judicial bodies, the lawmakers introduced a multitrack recruitment system and granted the Court budgetary autonomy. The nine judges—who serve five-year, renewable terms—are appointed by the president, the parliament, and the Supreme Court, with each institution filling three of the slots. This stipulation has ensured a diverse composition of the bench, with academic noncareer judges balancing their more legalistic colleagues from the Supreme Court. But the complex appointment mechanism has also reduced the dependence of judges on their nominating institution, especially if they intend to seek a second term. With alternative avenues of appointment available, judges don’t have to shy away from verdicts that could hurt the interests of their nominators. In the same vein, the budgetary independence enshrined in the law has allowed the Court to offer its judges remuneration packages that are much more attractive than those available at other judicial institutions. The remuneration system at the Court was put in place by its secretary-general, Janedjri M. Gaffar, who had previously been a senior official in the MPR administration and was therefore familiar with the very generous salaries paid at the legislature. Overall, the payment of competitive salaries has contributed to the independence of the judges vis-à-vis other state institutions, strengthening the system of checks and balances.

Beyond institutional factors, the role of the Court’s first chief justice, Jimly Asshiddiqie, was also important. Jimly was a politically as-
stitute bureaucrat and academic who had learned how to navigate the cliffs of elite intrigues in many years of working in government. He was close to Habibie, a former minister of technology, with whom he shared a strong belief in scientific innovation. Like Habibie, Jimly did not come from Indonesia’s main island of Java,11 making him distrustful of centralist governance. Jimly was also known for his perseverance, which he demonstrated by pushing for the construction of a representative court building immediately after his inauguration. In Indonesia’s status-conscious society, respect toward state institutions depends to no small extent on their ability to convey an impression of power and affluence (Lindsey 1993, 173), with the lavishness of their buildings indicating their political weight. Initially, the Constitutional Court was housed in emergency buildings and had to hold its trials in the MPR complex or the police headquarters, with petitioners questioning whether verdicts issued under such circumstances were legal.12 With this in mind, Jimly asked the government to pay for an imposing neoclassical building, modeled on US courthouses. Located in Jakarta’s government district, the office tower and a dome-roofed main building were eventually opened in 2007, becoming the most elaborate structure of any new state institution created after Suharto’s fall.

The institutional design of a constitutional court goes a long way in explaining its success or failure (Rotman 2004), and a later section of this article will return to this discussion. But we must first look at the judges’ verdicts and evaluate whether they indeed have supported the “consolidation of a stable democratic regime,” which Horowitz defined as the Court’s main role. This is particularly important, since the quality and acceptability of a court’s verdicts can be decisive in developing its moral stature in a society, which is arguably even more important than its formal judicial powers.

The Court’s Verdicts: Conflict Resolution

In their seminal work Problems of Democratic Transition and Consolidation (1996), Juan Linz and Alfred Stepan suggested that a consolidated democracy has three crucial characteristics. Behaviorally, there are no key political groups that attempt to overthrow democratic rule or secede from the nation-state; attitudinally, a strong majority of public opinion believes that any political change should occur within the framework of the existing democracy; and constitutionally, all political conflict will be resolved “within the specific laws, procedures and in-
stitutions” of the new democratic system (Linz and Stepan 1996, 5–6). Obviously, it is in this latter field of political conflict resolution that constitutional courts can make the greatest contribution to democratic consolidation. This section demonstrates that the decisions of Indonesia’s Court shifted the center of political conflict resolution from the streets to the courtroom, helping the country meet one of Linz and Stepan’s main criteria for a consolidating democracy.

The role of the Court in mitigating political conflict became most obvious in its rulings on electoral disputes. As discussed earlier, the 1999 elections had been held before the establishment of the Court, with subsequent conflicts developing into a large-scale political crisis that crippled the Wahid presidency. By contrast, the participants in the 2004 parliamentary and presidential polls could rely on the Court to settle all election-related disputes. The Court was authorized to rule on claims by electoral contestants that the official KPU count had been inaccurate, and it could alter the results if it deemed the presented evidence credible. As the parliamentary elections were to be followed by two rounds of presidential ballots, the Court’s decisions on the legislative polls constituted an important test case for its long-term credibility. The judges knew that flawed rulings could undermine their ability to issue authoritative verdicts in the future, forcing them into marathon sessions in which every detail of a petitioner’s claim was carefully analyzed. Ultimately, the case statistics reflected the Court’s conservative yet balanced handling of electoral complaints. Thirty-eight out of the 252 petitions filed by parties were approved, with the judges accepting and rejecting complaints from parties across the political spectrum, regardless of size or orientation (Asshiddiqie 2009, 321). This result instilled confidence in Indonesian society that the Court would accept motions if accompanied by strong evidence, but that it was also keen to protect the KPU’s count in order to maintain the credibility of the overall electoral process. The petitioners thus accepted the outcome of the court proceedings without significant protest, setting a critical precedent for the Court’s further involvement in resolving electoral disputes.

With its reputation strengthened by the collective acceptance of its verdicts on the legislative elections, the Court proceeded to take on a much greater challenge: the disputed presidential ballot. In the parliamentary polls, the Court’s decisions had only marginally changed the number of seats each party received in the House, making it relatively easy for parties to accept defeat in the courts. The presidential elections, however, were based on the winner-takes-all principle, with los-
ers not only denied the highest executive post in the country but also forced to write off millions of dollars in campaign costs. To make matters worse, the only petitioner to post a complaint at the Court was retired general Wiranto, who had finished third in the first round of the elections and thus failed to qualify for the runoff. Wiranto had been the armed forces chief during Habibie’s rule, when he presided over the mob mobilization surrounding the special session of the MPR and the military-sponsored chaos in East Timor in September 1999 (Greenless and Garran 2002, 131). The same Wiranto now claimed that around 5 million votes for him had not been counted and that he thus should be ranked second and allowed to contest the runoff. According to Asshid-diqie, the Court was pressured by thugs to rule in Wiranto’s favor, with the wife of Justice Ahmad Roestandi, an ex-general, receiving open threats. But the judges ignored the risk and threw out Wiranto’s case. With the Court standing its ground, its position was consolidated further.

The 2009 elections presented the Court with a very similar scenario. After the legislative elections in April, the Court considered 657 petitions, of which it approved seventy. In the presidential elections, the bench met with Wiranto again; this time, he had run as the vice-presidential candidate to Jusuf Kalla, the incumbent deputy to President Susilo Bambang Yudhoyono. After finishing last in the first round of the polls in July, Kalla and Wiranto claimed in court that no less than 34.5 million votes had been “lost” as the result of a sudden reduction in the number of polling booths. An additional complaint was filed by the second-ranked pair of Megawati Sukarnoputri and Prabowo Subianto, who insisted that they had been disadvantaged by the proliferation of 28 million “fictive” votes. Prabowo was Suharto’s feared former son-in-law, an ex-general sacked from the military in 1998 for the kidnappings of human rights activists (Tomsa 2009). Prabowo publicly pressured the Court to approve his application, reduce the number of votes credited to Yudhoyono and Boediono (whom the KPU had declared the winner with an absolute majority), and order a runoff. But, as in 2004, the judges were not intimidated; they rejected both petitions, making the second round of the ballot unnecessary. However, the Court also criticized the KPU for its poor electoral management, giving the unsuccessful petitioner a consolation prize with which they could appease their followers. Prabowo, previously not known for his graciousness in defeat, stated, “We have to honour the law, and whatever we do must be within this corridor,” while Megawati called on her followers to “go home now in peace.”
There is little doubt, then, that the Court's electoral dispute management has helped move Indonesia closer toward Linz and Stepan's definition of a state in which political conflicts are resolved "within the specific laws, procedures and institutions" of the democratic system. When Freedom House (2006) upgraded Indonesia's rating from "partly free" to "free" in 2006, it justified this move by referring to the "peaceful" and "orderly" elections of 2004, which "further consolidated the democratic political process." In its report, Freedom House particularly praised the Constitutional Court's "record for independent rulings that take due consideration of legal principles." In terms of the 2009 elections, some international experts insisted that the Court's "transparent adjudication of results-related disputes was the main reason that a potentially damaging period of political paralysis was averted" (Schmidt 2010, 101). As indicated earlier, such assessments gain particular credibility by a comparison between Indonesia's descent into constitutional crisis after 1999, when the Constitutional Court did not exist, and the post-2004 polity, which has proven capable of mitigating political tensions through the conflict resolution mechanisms made available by the Court.

The Court's Verdicts: Expansion of Democratic Rights

In addition to identifying constitutional conflict resolution as one of the main characteristics of a consolidated democracy, Linz and Stepan defined several organizing principles that support the main arenas of a democratic system. These principles include freedom of association and communication as well as free and inclusive electoral contestation, which form the foundation of civil society and political society, respectively. For Linz and Stepan, therefore, the expansion of individual freedoms and electoral inclusiveness are a clear indication of progressing democratic consolidation. In both areas, Indonesia's Constitutional Court has issued important verdicts that strengthened democratic rights. This section analyzes some of the Court's most groundbreaking and controversial rulings in this regard, demonstrating how these verdicts expanded political support for the Court and increased its autonomy.

In terms of upholding and expanding civil liberties, the Court broke some historic taboos. In December 2006, for example, the Court annulled three paragraphs of the criminal code that had made insulting the president a punishable offense. These articles dated back to Dutch colonial rule, when they had been known as *haatzaai-artikelen*. De-
signed to protect the royal family and colonial administrators from criticism by ordinary citizens, the regulations had made it into Indonesia’s legal codex after the country’s independence in 1945. While generally fond of anticolonial rhetoric, successive Indonesian governments had found it useful to maintain the articles in order to silence dissent and lock away troublemakers. Several activists had been tried during Megawati Sukarnoputri’s presidency (2001–2004) for the violation of these stipulations, and Yudhoyono had not intervened in legal proceedings against his critics either. But Eggi Sujana, an activist put on trial for insulting Yudhoyono, eventually brought the case to the Constitutional Court, which sided with the petitioner (Royan 2008). In a split decision (four of the nine judges submitted a dissenting opinion), the Court declared that the challenged paragraphs violated the constitutionally guaranteed freedom of expression and formed a “potential obstacle to Indonesia’s democratization.” Similarly, in July 2007, the Court revoked an article in the Criminal Code that threatened with imprisonment those “sowing hatred” toward the government.

The Court also ruled on issues in which individual freedoms were closely intertwined with political rights. In February 2004, for example, the judges overturned a stipulation in the election laws that banned former members of the Indonesian Communist Party (Partai Komunis Indonesia, PKI) from running in legislative ballots. While this ruling affected very few citizens, it had an immensely symbolic meaning. The systematic discrimination of former PKI members after the bloody destruction of the party in 1965 and 1966 had been one of the cornerstones of Suharto’s New Order regime, but post-1998 governments too had adopted anticommunism as one of their ideological guidelines. The question of how to heal the wounds of 1965 has remained one of the most emotional and divisive debates of Indonesia’s democratic polity, with both the executive and the parliament reluctant to do anything that may alienate the large segment of staunchly anticommunist voters, particularly in the Islamic community (McGregor 2009). The Court, however, found no substantive reasons why former communists should be denied the right to stand as candidates in elections. Arguing that the political rights of citizens outweighed possible security concerns of the state, the Court highlighted its paradigm of prioritizing the individual over the collective—an exact reversal of the “integralistic” ideology of Suharto’s New Order regime. While the decision drew harsh criticism from the Indonesian armed forces (Tentara Nasional Indonesia, TNI), the judges left no doubt that the country’s deeply engrained sentiments against previous members of the PKI had become constitutionally indefensible.
In the other crucial area highlighted by Linz and Stepan, that of free and inclusive electoral contestation, the Court has shown a particularly “activist” attitude. While the post-1998 polity had introduced competitive elections and gradually expanded their scope (Crouch 2010), the political elite had ensured that it retained control over the process of candidate selection and the allocation of seats. Consequently, ordinary citizens faced substantial difficulties in seeking elected office. It is these institutional hurdles to greater electoral inclusiveness that the Court has targeted with its decisions. In its first landmark verdict on this issue, the Court ruled in July 2007 on several articles of Law 32/2004 on Regional Government that had allowed only political parties or coalitions of parties to nominate candidates for the posts of district head, mayor, or governor. As a result of these regulations, candidates without access to political party networks had been excluded from running in local executive elections. The Court annulled these restrictions, opening the door for “independent” candidates to run as well. The possibility of party nominations was upheld, however, consoling party leaders who had spoken out against giving too much power to candidates without party affiliations. Ultimately, the Court established an effective balance between the right of individuals to compete in elections and the importance of political parties as pillars of any democratic system.

However, the Court not only limited the dominance of parties over executive elections; it also intervened in the framework for legislative elections, an area political parties tend to be particularly protective about. For the 2009 elections, parliament had agreed on a very complicated election system based on proportional representation with a partially open party list (Sukma 2009). In this system, Indonesians were given the choice of voting for a party or for a party-nominated candidate. Subsequently, seats won by a party in a particular district were supposed to be allocated to those nominees with the highest number of personal votes. However, this mechanism would have become operational only for candidates who met or exceeded a threshold of 30 percent of a full electoral quota (i.e., the number of votes parties needed to win one seat). If no candidate fulfilled this requirement, the seats would have been given to the nominees ranked highest on a list of candidates submitted by parties prior to the election. Given the 2004 results, it was widely predicted that only a tiny minority of candidates would have won their mandates directly in 2009, with the bulk of the seats going to party elites conveniently located on top of the lists. But in December 2008, the Court declared the whole system of party list rankings un-
constitutional. Implicitly, the judges determined that seats obtained by parties had to be handed to those candidates with the largest number of individual votes, regardless of their ranking on the party list. Thus, by annulling parts of a single article in the election law, the Court had effectively introduced a new electoral system for Indonesia. Moreover, with this fully open party list system, Indonesia had suddenly one of the most competitive legislative elections in the world.

But the Court didn’t stop there. In July 2009, it also stepped in to resolve a dispute over incomplete and inaccurate voters lists that threatened to reduce the legitimacy of the presidential elections (Schmidt 2010). According to the election law, only voters registered in official lists drafted by the KPU had the right to vote. However, many voters had not been registered or had been included in lists at wrong locations, with Yudhoyono’s political opponents suspecting that the government systematically disenfranchised citizens in order to weaken the president’s challengers. In a decision issued two days before the ballot, the Court ruled that every Indonesian citizen with a valid identity card and other documents would be allowed to vote. The verdict defused the tensions ahead of the ballot and preempted attempts by the losing candidates to declare the elections illegitimate due to the large number of disenfranchised voters. While the decision was politically prudent, it stood formally on shaky grounds: the Court had not annulled a specific article of a law but had given a binding legal opinion that essentially functioned as a piece of ad hoc legislation. With this, the judges had entered new legal territory, moving from their constitutionally anchored role as “negative legislators” into the gray zone of “positive” judicial lawmaking. The verdict enjoyed such widespread support, however, and its implications were so obviously in support of both individual rights and the democratic credibility of the elections, that the legalistic-formal problems associated with the decision were not questioned further.

It is important to note that when Freedom House in 2008 upheld Indonesia’s rating as a “free” country and confirmed its status as an electoral democracy, it did so with explicit references to rulings by the Constitutional Court. Focusing on the verdicts “overturning articles of the penal code that criminalized defamation and allowing independent candidates to contest local elections,” Freedom House (2008) included them in the “significant” developments that allowed Indonesia to maintain its status as the only democracy in Southeast Asia. For the indexers at Freedom House, it seems, the contribution of the Constitutional Court to improving Indonesia’s scores in civil liberties (from 3 in 2003 to 2 in 2006) and political rights (from 4 in 2003 to 3 in 2006) was obvious—in contrast to most
political scientists writing on Indonesia at that time, who continued to overlook the Court when explaining the country’s democratic progress.

**The Court’s Autonomy: Key Factors**

While the preceding discussion demonstrated that the Court has entrenched constitutional conflict resolution and expanded civil liberties and political rights, little has been said so far about how the Court has achieved this. Given that constitutional courts in other parts of the Southeast Asian region, most notably in Thailand, have turned into instruments for nondemocratic political actors, there must be specific reasons for the capability of the Indonesian Court to buck this trend and become an agent of democratization. In the scholarly literature on constitutional courts, some authors have pointed to the level of political power dispersal and competitiveness in a society as the most important determinant of a court’s ability to defend democratic constitutions. Ginsburg (2003, 33), for example, suggested that strong mechanisms of judicial review are the result of a highly diffuse political society, or even of “political deadlock.” By contrast, states dominated by a single party are likely to establish weak judicial review regimes. While Ginsburg thus focuses on the political and institutional conditions under which constitutional courts were created, Matthew Stephenson has extended this argument into the period of their actual operation. According to Stephenson (2003, 61) “support for independent judicial review is sustainable only when the political system is sufficiently competitive.” The following discussion of the Indonesian case provides evidence for this hypothesis but also highlights other factors: Ginsburg’s emphasis on institutional matters, the role of civil society, the personal attitudes of judges and the elite, and the moral stature of the Court, which was bolstered by its political “activism.”

Similar to the findings of Ginsburg’s and Stephenson’s case studies, the level of political power dispersal and competitiveness played a significant role in the success of the Indonesian Constitutional Court. In contrast to the New Order regime, in which Suharto’s authority was all-pervasive, the post-1998 state has no clearly defined power center. Instead, power is dispersed widely across the sociopolitical landscape, with government, parliament, courts, security agencies, and civil society at both the national and local levels competing for influence. In such a situation, no single political actor has been powerful enough to intimidate a key institution like the Constitutional Court. To begin with, the post-Suharto presidency has
been much less influential than during the Sukarno regime in the 1960s and Suharto’s New Order (McIntyre 2005). While the president now enjoys a direct mandate from the electorate, he or she faces a decentralized polity with highly assertive parties, bureaucrats, and society leaders. Consequently, a phone call by the president in today’s Indonesia does not carry nearly as much weight as one made by Sukarno or Suharto during their authoritarian regimes. This does not mean, however, that presidents and other executive leaders have not tried to influence the Constitutional Court. According to Asshiddiqie, Yudhoyono has often made his displeasure with particular verdicts known, using body language and other forms of indirect communication. Then vice-president Kalla, for his part, frequently phoned judges and released his anger over their decisions, giving lengthy lectures on why they obstructed the government’s work. But whatever the government has thrown at the judges, the Court has been able to remain independent.

One of the institutions that observers had initially feared would try to intimidate the Court is the Indonesian military. Forming the backbone of Suharto’s regime for more than three decades, the armed forces were used to having their way in government, parliament, and the courts. Under the New Order, an “invitation” to an official to visit a military command for a “briefing” was almost certain to result in that person’s adoption of a proarmy stance on any given issue. After 1998, however, that power of political coercion declined drastically. While occasionally still able to gain concessions from the civilian elite in times of instability, the military was increasingly marginalized (Mietzner 2009). Nevertheless, leaders of the military—both active and retired—made several attempts to intervene in the proceedings of the Court, most of them in 2004. In addition to the intimidation of Justice Roes-tandi by Wiranto supporters during the latter’s electoral complaint, the Court also came under pressure from the military over its decision to lift the ban on former PKI members to run for office. Following the verdict, judges received phone calls from senior military commanders, complaining that the Court had not “coordinated” with the armed forces leadership over the issue. The judges, however, gave the generals the cold shoulder, an act that both reflected and accelerated the deterioration of the military’s influence. In complex ways, the empowerment of the Court and the military’s waning power were interlinked: while the Court’s strength was partly the result of the declining influence of the military, the growing self-confidence of the Court and its emergence as Indonesia’s key political referee sidelined the armed forces even further.
If the Court has given in to external pressure, this was mostly the result of forceful civil society and media campaigns. While the judges have varied opinions on the role of civil society, its net impact for the Court has no doubt been supportive. For Asshiddiqie, the power of public opinion and NGO activism has been much stronger than any intimidation exerted by the executive, parliament, or the military.\(^{31}\) Admitting that "some judges want to be popular," Asshiddiqie nonetheless insisted that the Court has tried to isolate its judgments from populist pressures. According to the former chief justice, the Court's "success" in this regard was reflected in the love-hate relationship between the judges and civil society groups: "They loved the decision on the PKI members, but they hated the verdict on the Truth and Reconciliation Commission, which we scrapped in 2006—that's life."\(^{32}\) However, in the view of Maruarar Siaahan, one of the most liberal judges on the bench, public opinion and the NGOs have been much more of an ally than an intimidating force that needed to be fended off. "Public opinion has been very kind to the Court," Siaahan said, "and public opinion is created and nurtured by the press."\(^{33}\) For Siaahan, the media has been "absolutely vital" in the Court's attempts to defend its independence vis-a-vis vested interests in other state institutions. The Court, it appears, has allowed some public pressure to influence its verdicts but has in exchange received the support from the media and civil society that has effectively shielded the bench from more damaging interventions by Indonesia's political elite.

As Ginsburg and Horowitz highlighted, the institutional setup of a court is a very important factor in its effectiveness. However, while Ginsburg largely focuses on the extent of access that applicants have to the Court (i.e., whether this access is limited to state elites or broadly defined), the strength of the Indonesian Court seems to have other institutional reasons as well. It has already been pointed out that the Court's budgetary autonomy allowed for the payment of high salaries to the judges, isolating the bench from the pandemic corruption that has befallen the Supreme Court and other branches of Indonesia's judiciary (Pompe 2005). Similarly, the Constitutional Court adopted a slim bureaucratic structure, trying to avoid the deficiencies inherent in the Supreme Court's organization. Unlike the Supreme Court, whose huge apparatus with tens of thousands of civil servants had bred mismanagement, patronage, and nepotism, the Constitutional Court consists of only nine judges in the center and a small administrative staff. New Constitutional Court judges who had previously been with the Supreme Court have thus described their experience of moving into a completely different working environment as "liberat-
ing." Particularly non-Javanese judges, who felt that the Supreme Court was dominated by the hierarchical thinking of Javanese royal courts, have enjoyed the more open climate at the Constitutional Court; in 2010, five of its nine judges were from the outer islands.

One of the most important institutional elements of the Court’s autonomy has been its multitrack appointment system. This mechanism—through which three judges each are named by the president, parliament, and the Supreme Court—has not only produced a very diverse bench but also loosened the ties between justices and their nominating institutions. With judges able to explore several opportunities to seek reappointment, they are not bound to the interests of a single political actor. One example of this was Justice Harjono, who had been appointed by President Megawati Sukarnoputri in 2003. Previously, he had been a member of the MPR representing Megawati’s Indonesian Democratic Party of Struggle (Partai Demokrasi Indonesia Perjuangan, PDIP). When Yudhoyono began to select his three nominees for the second term of the Court in 2008, Harjono did not even get an interview, although other incumbent judges were invited. Harjono suspected that Yudhoyono viewed him as “Megawati’s man,” and he subsequently applied at parliament for one of the three nominations available there. While he initially lost out to other candidates, he won a seat on the bench after Asshiddiqie resigned and parliament held a new vote to fill the vacancy. Arguably, the fact that Yudhoyono had refused to reappoint Harjono had made the latter even more attractive in the eyes of parliamentarians keen to provide a counterbalance to the presidency. In meetings with senior legislators, Harjono convinced them that he had the necessary experience to defend the Court’s independence. Impressed by Harjono’s explanations, parliament selected him with a large majority of votes.

Beyond the fragmentation of power and institutional factors, the impacts of personal agency also played a role in upholding the Court’s autonomy. While the Court’s two chief justices so far have been crucial in this regard, the attitudes of political protagonists vis-à-vis the Court have been vital as well. These attitudes cannot be explained by concentrating exclusively on institutional or cultural factors—they are also the result of the composition of today’s political elite in Indonesia. Most important, since Abdurrahman Wahid’s erratic and conflict-ridden rule ended in 2001, Indonesia has not encountered a similarly belligerent leader; instead, restraint, inclusivism, and moderation have dominated presidential politics and the political mainstream (Mietzner 2008). Significantly, this has spared the Court the experience of having
to deal with a president who would ignore or override its verdicts—something Wahid arguably would have done. Yudhoyono, for example, has carefully avoided any direct confrontation with the Court and its judges. When Yudhoyono interviewed Mukthie Fadjir for a second term and told him that it would be “useful” if he “coordinated” with the government over key verdicts, Mukthie politely rebuked him with a lecture about the value of the independence of the Court; Yudhoyono simply nodded and approved the appointment. Thus, while the respect of Indonesian politicians toward the Court’s verdicts is partly a result of the latter’s strong standing, it also reflects the predominance of moderate political leadership after 2001.

Personal agency was also an important element in the final factor to be examined here: the high moral authority of the Court. There are strong indications that the Court’s popularity and stature have been a direct consequence of the judges’ aggressive “judicial activism.” Significantly, it was after particularly contentious decisions that the Court’s judges were most likely to be celebrated as heroic figures by the Indonesian media and public. For example, after the Court had once again tested the limits of its authority by intervening in a high-profile corruption case in late 2009, its chief justice was decorated with prestigious bravery awards by several NGOs and universities. The Court, it appears, owes its exceptional moral stature not only to the conventional exercise of its institutional powers but also to its determination to go beyond them. As demonstrated in the discussion of its verdicts, the judges have not hesitated to expand their own powers when they believed that this was necessary to remove “obstacles to democratisation.” Hence, the Court has drawn its strength to a significant extent from the very activist agenda that Horowitz and other authors (Butt 2006, 2007; Mahfud 2009) view as potentially harmful for its credibility. In contrast to Horowitz’s (2006, 131) warning of the Court’s “ politicization,” my analysis of the Indonesian rulings and their reception suggests that it was precisely the unorthodox approach of the judges that made the Court the respected referee in political conflicts that the early post-Suharto period so desperately lacked.

**Conclusion: The Constitutional Court and Democratic Consolidation**

This article has shown that the Constitutional Court made a significant contribution to Indonesia’s transformation from a conflict-ridden,
politically unstable country into a consolidating democracy. By establishing institutional mechanisms of political conflict resolution, the Court provided an avenue for Indonesia’s elite to settle its disputes by judicial means rather than through mass mobilization. In doing so, the Court ensured that Indonesia moved closer to fulfilling one of Linz and Stepan’s main conditions for consolidating a democracy: the settlement of conflicts within the procedural framework of the existing democratic system. As evidenced by the Freedom House scores, the Court also expanded civil liberties and political rights—another key criterion established by Linz and Stepan for consolidating democracies.

In explaining how the Court managed to maintain its independence from external pressures and turn into an agent of democratization, this article has adopted Ginsburg’s, Horowitz’s, and Stephenson’s emphasis on the importance of the diffusion of political power and the institutional design of the Court, but it also pointed to the judges’ judicial activism as a main source of their societal support, moral authority, and unassailability. The latter part of this assessment suggests that, in Horowitz’s words, “not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights” (Horowitz 2006, 131). Accordingly, I have argued that while structural trends and patterns are important in determining a Court’s influence and power, the role of personal agency (i.e., risk taking by judges and moderate political leadership) is crucial as well.

There are several caveats, however. First, and quite naturally, not all decisions of the Constitutional Court have been popular and supportive of further democratization. For instance, the Court’s decision on the Truth and Reconciliation Commission in 2006 drew fierce criticism from civil society groups, as did its verdict on the anticorruption courts in the same year. In the latter ruling, the judges declared that the establishment of special, Jakarta-based anticorruption courts—which had turned out to be an effective and much-praised instrument in the fight against corruptors—was unconstitutional. But while decisions like these may have temporarily angered prodemocracy activists, they also consolidated the Court’s long-term reputation as an independent and free-minded institution. With this gradually increased capital, the Court found it easier to impose and defend its other controversial verdicts, most of which reflected a “liberal” and democratic agenda.

Second, there is no clear evidence for a direct causal relationship between the creation of the Court in 2003 and the concurrent stabilization of Indonesia’s democratic polity. While it is clear that the Court’s verdicts have resolved political conflicts peacefully and advanced civil
liberties and rights, it is less obvious whether the stability of democratic politics after 2003 has been the source or the product of the Court’s success. Arguably, the Court and democratic stabilization have mutually supported each other, with more steady political conditions allowing the judges to issue their rulings in an orderly fashion, and their verdicts subsequently further consolidating the polity. It is difficult to assess whether the Court would have been able to establish its authority as quickly as it did had it operated in a different political climate—for instance, in a deeply polarized society such as Thailand’s under and after Thaksin. Thailand’s Constitutional Court had also been established as the result of a highly diffuse political society and was equipped with institutional powers very similar to Indonesia’s (Dressel 2009), but it was unable to cope with the chaotic and violent fracturing of Thai politics after 2005 (Funston 2009). Had post-2003 Indonesia been led by a president as antagonistic and divisive as Thailand’s Thaksin (Abdurrahman Wahid, for example), it is far from certain whether the Court would have been as strong and authoritative as it currently is.

Third, the fact that the Court has become Indonesia’s main driver of democratic reforms casts a shadow on the state of the country’s other key political and judicial institutions. While the Court has pushed the democratic reform agenda forward, the government, parliament, and other branches of the legal system have stalled further political change (Sherlock 2010). In view of this, Horowitz (2006, 135) has warned that “in law, as in life, what is routine is often more important than what is exceptional.” In other words, the focus on constitutional adjudication should not distract from the task of consolidating a country’s “routine” political and legal bodies and procedures. Nevertheless, many Indonesians have been grateful for the existence of institutions like the Constitutional Court and the Corruption Eradication Commission (Komisi Pemberantasan Korupsi, KPK), which have successfully isolated themselves from Indonesia’s notoriously corrupt politics of patronage. It is in this context that criticisms of the Court’s “activism” need to be qualified. While there is no doubt that the Court has at times crossed the limits of its mandate, it has done so in the interest of protecting and expanding democratic rights, not in order to establish itself as an unaccountable judicial superpower. Against the background of democratic stagnation (and probably even recession), judicial activism in support of further reform may be not only tolerable but exactly what Indonesia’s young democracy needs in order to consolidate.
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**Notes**

1. One notable exception has been Davidson (2009).
2. “Mahasiswa Aksi di Mahkamah Agung, Dihajar Tentara” [Students demonstrate at Supreme Court, beaten up by soldiers], *SiaR*, November 10, 1998.
5. However, according to a member of the MPR working committee that decided on the creation of the Constitutional Court, the Supreme Court was initially approached to accept the authority of judicial review, but its chief justice declined. Interview with Justice Harjono, Jakarta, October 2, 2009.
6. Article 1, Law 24/2003, on the Constitutional Court.
8. Article 18 (1), Law 24/2003, on the Constitutional Court.
10. Article 9, Law 24/2003, on the Constitutional Court. In November 2009, Chief Justice Mahfud MD declared in a television interview that his monthly salary was 34 million rupiah (US$3,500). This was significantly more than the chief justice of the Supreme Court (24.4 million rupiah), cabinet ministers (18.6 million), or the chairman of parliament (30.9 million). See “Perbandingan Gaji Presiden, Gubernur BI dan Menteri” [Comparison between the salary of the president, governor of the Central Bank and ministers], *Berita Kita*, October 26, 2009.
11. Habibie was from Sulawesi, while Jimly was born in Sumatra.
13. Overall, the Court heard 274 cases, of which 252 were submitted by political parties, 21 by candidates for the Regional Representatives Council (Dewan Perwakilan Daerah, DPD), and 1 by a presidential and vice-presidential ticket.
14. In filing their complaints, parties had to provide evidence that the KPU count in specific electoral constituencies was incorrect, and that the distribution of seats based on that inaccurate result had disadvantaged them. Other
complaints—such as protests against alleged “money politics” or favoritism of the government toward a particular party—had to be referred to the police, not the Constitutional Court. However, after the responsibility for resolving disputes in elections for local government heads was transferred from the Supreme Court to the Constitutional Court in 2008, the judges of the Constitutional Court began to take a more “flexible” view on the limitations set by the law. In 2010, the Court ordered recounts and even fresh elections in some districts in which it had found violations unrelated to the vote count itself.

15. Interview with Jimly Asshiddiqie, Jakarta, September 29, 2009.
17. “Statiska Perkara Perselisihan Hasil Pemilu 2009” [Case statistics on disputes in the 2009 general elections], Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Republic of Indonesia], Jakarta.
20. Articles 134, 136, and 137 of the Criminal Code had threatened anyone insulting the president or vice-president with a maximum of six imprisonment.
22. Article 60 (g) of Law 12/2003 on legislative elections had excluded anyone from becoming a parliamentary candidate who had formerly been a member of the PKI or was somehow involved in its alleged coup attempt in September 1965.
24. The challenged articles were Article 56 (2), Article 59 (1) to (4), Article 59 (5a) and (5c), Article 59 (6), and Article 60 (2) to (5), all in Law 32/2004 on regional government.
28. The Freedom House ratings range from the best score of 1 to the worst of 7.
30. Interview with Deputy Chief Justice Mukthie Fadjar, Jakarta, October 1, 2009.
32. Ibid. In December 2006, the Court invalidated the entire Law 27/2004 on the Truth and Reconciliation Commission, although the petitioners (who were human rights activists) had challenged only specific articles.
33. Interview with Justice Maruarar Siaahan, Jakarta, October 2, 2009.
34. Interview with Jimly Asshiddiqie, Jakarta, September 29, 2009.
35. Interview with Justice Maruarar Siaahan, Jakarta, October 2, 2009.
36. Interview with Justice Harjono, Jakarta, October 2, 2009.
37. After his removal from the presidency, Wahid appealed to both the Constitutional Court and the Supreme Court to allow him to run again in the 2004 elections, despite stipulations in the electoral law that required candidates to be physically and mentally fit (Wahid was blind and largely bound to a wheelchair). Both courts rejected his petition, and Wahid called the judges “cowards” who had been manipulated by his political rivals. See “Gus Dur Akan Tuntut KPU” [Gus Dur will sue KPU], Tempo Interaktif, May 16, 2004.
38. Interview with Deputy Chief Justice Mukthie Fadjar, Jakarta, October 1, 2009.
41. The criticism of the Court’s “judicial activism” is also often echoed by Indonesian politicians, whose powers have been reduced by the existence and actions of the Constitutional Court. Interview with Ganjar Pranowo, member of parliament for PDIP, Jakarta September 30, 2009.
42. Putusan Perkara Nomor [Case decision number] 012-016-019/PUU-IV/2006. The Court argued that defendants brought before the anticorruption courts were disadvantaged because their judges had handed down guilty verdicts in all cases handled by them, without exception. Defendants still tried in normal courts, by contrast, faced a much higher probability of obtaining an acquittal. For the Constitutional Court, this legal dualism was unacceptable, and it ordered the government and parliament to come up with a new concept.

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